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## PP v. JARIZAL JASNI

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[CRIMINAL APPEAL NO: WA-41H(A)-1-05-2022]
7 AUGUST 2023

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**Abstract** – *While s. 31A of the Dangerous Drugs Act 1952 allows officers or listed persons to examine the arrested persons, and further, s. 31A(1A) specifically allows the police to obtain a urine specimen, both subsections require the person to first be arrested before his urine sample could be collected.*

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***CRIMINAL PROCEDURE:*** *Charge – Defective – Accused charged for administering drugs to himself – Date wrongly stated in charge – Whether accused misled by error or omission – Whether mistake occasioned failure of justice – Whether mistake curable – Criminal Procedure Code, ss. 156 & 422*

D

***CRIMINAL LAW:*** *Dangerous drugs – Arrest – Constructive arrest – Accused charged for administering drugs to himself – Drugs found in urine – Whether there was arrest made on accused prior to giving urine sample – Whether ss. 31A(1) and 31A(1A) of Dangerous Drugs Act 1952 breached*

E

***CRIMINAL LAW:*** *Dangerous drugs – Urine collection – Accused charged for administering drugs to himself – Drugs found in urine – Urine collected in one bottle – Two different types of drugs found in one bottle of urine sample – Whether failure of police to collect urine sample in two bottles fatal – Whether manner in which urine sample was collected from accused legal – Dangerous Drugs Act 1952, s. 15(1)(a)*

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A team of police officers, led by SP2, had conducted a raid at an entertainment centre where 143 individuals, including the respondent, were made to undergo a preliminary urine test. The respondent was accompanied by a police personnel to the washroom to give his urine sample. He then handed the bottle containing his urine sample to SP2 who conducted a preliminary screening test. The respondent's urine sample tested positive for amphetamine. The bottle was handed over to a science officer who confirmed that the respondent's urine sample tested positive with amphetamine and later, in another test, positive of MDMA. The respondent was charged under s. 15(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), at the Magistrates' Court, for the offence of administering drugs to himself. At the close of the prosecution's case, however, the Magistrate acquitted the respondent on the grounds that: (i) the following pre-conditions were not fulfilled and, as such, the statutory presumption under s. 37(k) of the DDA did not apply: (a) the respondent was already arrested before he was directed to give his urine sample; and (b) the police ought to have taken the

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respondent to the nearest hospital, or requested some assistance from any medical officer for the urine sample to be taken, and the preliminary screening test ought to have been conducted at the police narcotics office; and (ii) two bottles of urine sample ought to have been obtained from the respondent since there were two different results from the same bottle of the respondent's urine sample. Hence, the present appeal by the appellant ('prosecution'). At the outset of the appeal, the respondent contended that the charge preferred against him was defective as the date was wrongly stated.

**Held (dismissing appeal; affirming decision of Magistrates' Court):**

**(1)** Pursuant to s. 156 of the Criminal Procedure Code ('CPC'), no error in stating or omitting to state the offence or the particulars in the charge shall be regarded, at any stage of the case, as material unless the accused was, in fact, misled by such error or omission. Further, s. 422 of the CPC is a general provision for a cure for any error, omission or irregularity in the charge unless it occasions a failure of justice. The respondent had not shown or established that he was misled by the error or omission. The date was just a small error curable under s. 422 of the CPC. It could not be gainsaid that the mistake as to the date in the charge had occasioned a failure of justice or that the respondent was misled by such error or omission. The respondent was able to understand and conduct the case as in the nature and substance of the offence that was preferred against him. (paras 19 & 20)

**(2)** Section 31A of the DDA provides lawfulness of actions taken by officers or listed persons to conduct examination on an arrested person. Section 31A(1A) of the DDA specifically gives limited power to the police to facilitate a medical examination *ie*, to obtain a urine specimen from an arrested person. Arrested person appears to be a pre-condition to ss. 31A(1) and 31A(1A) of the DDA. The respondent could not be said to be under constructive arrest just because he was escorted to the washroom. This was not the case where, at the time the respondent was instructed to give his urine sample, he was arrested on a charge of committing an offence against the DDA or alleged to have been committed under such circumstances. This was a random examination conducted by the police during a raid and arrest would only take place if evidence of offence, under s. 15(1)(a) of the DDA, had been obtained. The respondent was only suspected to have committed an offence against the DDA after he had given his urine sample and, hence, the arrest only took place thereafter. The Magistrate did not err in finding that there was no arrest made on the respondent prior to giving his urine sample. As such, the actions taken by the police breached ss. 31A(1) and 31A(1A) of the DDA. The discretion to admit illegally obtained evidence in this case could not be exercised. (paras 22, 29-31 & 33)

**(3)** The court and the Magistrates' Court were bound by the decisions in *PP v. Rosman Saprey & Satu Lagi Rayuan* and *PP v. Ahmad Saiful Islam Mohamad* where, in both cases, the Court of Appeal held that the failure of the police to collect urine sample in two bottles was not fatal to the prosecution's case. However, in the instant case, the view taken by the Magistrate was made on the ground that there were two different results as to the type of drugs found in the same urine sample bottle. There were no efforts on the part of the prosecution to explain the discrepancies through their witnesses. (paras 40 & 41)

**Case(s) referred to:**
*Aizuddin Syah Ahmad v. PP [2019] 3 CLJ 318 CA* ***(refd)***
*Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA* ***(refd)***
*Kuruma v. The Queen [1968] 3 WLR 391* ***(refd)***
*PP v. Ahmad Saiful Islam Mohamad [2023] 2 CLJ 714 CA* ***(dist)***
*PP lwn. Mohd Safwan Husain [2017] 7 CLJ 685 CA* ***(refd)***
*PP lwn. Rosman Saprey & Satu Lagi Rayuan [2019] 4 CLJ 767 CA* ***(dist)***
*R v. Sang [1980] AC 402* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 156, 399, 422
Dangerous Drugs Act 1952, ss. 15(1)(a), 31, 31A(1), (1A), 37(k)

*For the appellant - Mohamad Shahrizzat Amadan; DPP*
*For the respondent - Azmi Talib; M/s Aidil Effendy Azmi & Co*

*[Editor's note: Appeal from Magistrate's Court; Criminal Case No: WA-82D-48-07-2020 (affirmed).]*

*Reported by Najib Tamby*

## JUDGMENT

**Noorin Badaruddin J:**

**[1]** The respondent was charged under s. 15(1)(a) of the Dangerous Drugs Act 1952 ("DDA") at the Magistrate's Court Kuala Lumpur. The charge against the respondent reads:

> Bahawa kamu pada 30.11.2020 jam lebih kurang 3.15 pagi bertempat di tandas lelaki pusat hiburan GN Diversided Sdn Bhd @ Mankar No. 13, 15 & 17, Asian Heritage Row, Jalan Doraisamy, dalam daerah Dang Wangi Wilayah Persekutuan, Kuala Lumpur, telah didapati memberi kepada diri sendiri dadah berbahaya iaitu jenis Methylmedioxymethamphetamine (MDMA). Oleh itu kamu telah melakukan kesalahan di bawah seksyen 15(1) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen yang sama.

**[2]** Five witnesses were called by the prosecution to give evidence before the Magistrate Court. At the close of the prosecution case, the Magistrate found that the prosecution has failed to prove a *prima facie* case against the respondent. The respondent was therefore acquitted and discharged. Aggrieved with the decision, the Public Prosecutor appealed.

**The Case For The Prosecution**

**[3]** On 30 November 2019 at around 3.15am, a team from the Criminal Investigation Narcotic Division, Dang Wangi Police Headquarters led by one ASP Hisam bin Abu (SP2) conducted a raid at an entertainment centre known as Pusat Hiburan GN Diversified Sdn Bhd @ Mankar, No. 13, 15 and 17, Asian Heritage Row, Jalan Doraisamy, 50300 Kuala Lumpur ("the premise").

**[4]** At the premise, a total of 143 individuals were made to undergo a preliminary urine test including the respondent.

**[5]** The respondent was told by SP2 that a urine test would be conducted on him and that he was free to choose the bottle for the urine sample collection. The respondent has chosen a bottle with a serial number 0449741.The respondent was then accompanied by one detective Sergeant Major, D/SM Letchumanarajan (SP4) to the washroom at the premise where he gave his urine sample. The respondent surrendered the bottle containing his urine sample to SP2 at the documentation table and opened the cover of the bottle in front of SP2.

**[6]** SP2 then conducted a preliminary screening test by dipping five test strips of Meth/Mop/THC/Ket/Amp into the respondent's urine sample. The preliminary screening test was conducted in the presence of both the respondent and SP4.

**[7]** The respondent's urine sample tested positive for amphetamine and the respondent was informed of the same. The respondent was then asked by SP2 to close the bottle lid.

**[8]** SP2 proceeded to do the necessary marking on the sticker label of the bottle. The respondent's details and his signature were penned down on the label of the bottle. SP2 then sealed the bottle by placing a blue sticker around the bottle lid and also on the bottle with the serial number 0449741.

**[9]** Both the respondent and SP2 (marked as the sample collector) placed their signatures on the bottle and on the "borang permintaan ujian pengesanan dadah dalam air kencing". SP2 lodged a police report regarding the raid.

**[10]** On the same day at around 10.30am, SP2 handed over the following exhibits to the investigating officer, Inspector Nur Nurul Alia binti Ab Aziz (SP5):

(i) police report Dang Wangi/032621/19 (P4);

(ii) UPD Form 9 (P6);

(iii) respondent's urine sample bottle (P2 (a)-(c)); and

(iv) borang serah menyerah (P5).

**[11]** SP5 further instructed for photographs of the urine sample bottle be taken and the said bottle was kept in a refrigerator at her office for safekeeping thereafter.

**[12]** On 2 December 2019, at around 3.30pm, SP5 took the urine sample bottle as in exhs. P2 and P6 to the drug laboratory and research unit at the Kuala Lumpur Hospital and handed over both exhs. P2 and P6 to one Mr Eng Choon Siang, a science officer (biochemistry) (SP3). On the same day, SP3 conducted a preliminary test using the immunoassay method with the chemistry apparatus called COBAS6000 on the respondent's urine sample with the laboratory reference number 95636172019. The respondent's urine sample was tested positive with amphetamine type stimulants (ATS). The urine sample bottle then was kept in a refrigerator designated with the temperature of 2-8 degrees Celsius with SP3 being the only person having custody of the urine sample bottle.

**[13]** On 6 December 2019, SP3 conducted a confirmation test using the gas chromatography mass spectrometry by using the GCMS Agilent apparatus on the respondent's urine sample and found the specimen to be positive of drugs type 3,4-Methylenedioxymethamphetamine (MDMA), a dangerous drug listed in the First Schedule of the DDA.

**[14]** On 7 December 2019, SP3 handed over his report under s. 399 of the Criminal Procedure Code ("CPC") to SP5 and the report was marked as P7.

**Findings Of The Magistrate's Court At The Close Of The Prosecution Case**

**[15]** Summarily, the learned Magistrate acquitted the respondent on the following grounds and these grounds were the main contentions raised by the prosecution in their petition.

**[16]** Firstly, the learned Magistrate was of the view that these pre-conditions have not been fulfilled and as such the statutory presumption under s. 37(k) of the DDA does not apply to the present case:

(i) that the respondent was already arrested before he was directed to give his urine sample; and

(ii) that the police (ought to) have taken the respondent to the nearest hospital or had requested some assistance from any medical officer for the urine sample to be taken pursuant to s. 31A of the DDA and the preliminary screening test to be conducted at the police narcotic office.

**[17]** Secondly, the learned Magistrate was of the view that two bottles of urine sample ought to have been obtained from the respondent since there were two different results from the same bottle of the respondent's urine sample. The respondent's urine sample was tested positive for amphetamine

from the preliminary screening test conducted by SP2 at the premise whilst from the gas chromatography mass spectrometry confirmation test conducted by SP3, drugs type MDMA was found from the same urine sample. The learned Magistrate further stated as follows:

> Mahkamah berpendapat 2 botol air kencing adalah diperlukan bagi memastikan tiada "miscarriage of justice". Sekiranya 2 botol digunakan bagi tujuan ujian pengesanan dadah dalam air kencing maka keraguan ini dapat dielakkan dan dapat mengelakkan risiko sampel air kencing OKT daripada tercemar memandangkan ahli patologi akan dapat melakukan ujian pengesanan dadah dalam air kencing pada botol kedua.

## Findings

**[18]** At the outset, it must be stated that during oral submission, this court was alerted by the learned defence counsel that the charge preferred against the respondent is defective as the date was stated to be 30 November 2020, instead of 30 November 2019, the latter being the correct date the raid took place. Learned counsel admitted that he realised the defect just recently, prior to the oral submission date fixed before this court. Learned counsel stated that no effort was taken by the prosecution to amend the charge throughout the trial before the Magistrate Court.

**[19]** It has been provided under s. 156 of the CPC that no error in stating or omitting to state the offence or the particulars in the charge shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission. Further, s. 422 of the CPC is a general provision for a cure for any error, omission or irregularity in the charge unless it occasion a failure of justice.

**[20]** The respondent herein or at the court below has not shown or establish that he was misled by the error or omission. This court finds that the date is just a small error curable under s. 422 of the CPC and from the notes of proceedings, it cannot be gainsaid that the mistake as to the date in the charge has occasioned a failure of justice or that the respondent was misled by such error or omission. The notes of proceedings demonstrate that the respondent and his counsel was able to understand and conduct the case as in the nature and substance of the offence that was preferred against the respondent.

**[21]** The main contention in the present matter relates to the question as to whether the manner in which the urine sample was collected from the respondent is legal. The relevant provision is s. 31A of the DDA. Subsections 31A(1) and 31A(1A) of the DDA state:

> Examination of arrested person by a medical officer
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> 31A. (1) When any person is arrested on a charge of committing an offence against this Act:
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> (a) which is of such a nature; or

A (b) which is alleged to have been committed under such circumstances, as give reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence against this Act, it shall be lawful for a medical officer acting at the request of any police officer not below the rank of Sergeant, or any other officer in charge of a police B station, or any officer of customs, and for any person acting in aid of a medical officer and under his direction, to make such an examination or examinations of the person arrested as may be reasonably necessary in order to ascertain the facts which may afford such evidence, and to use or cause to be used such force as may be reasonably necessary for that purpose.

C (1A) For the purpose of preservation of evidence, it shall be lawful for a police officer not below the rank of Sergeant or an officer of customs to require an arrested person to provide a specimen of his urine for the purposes of an examination under subsection (1) if it is not practicable for the medical officer or the person who is acting in aid of or on the direction D of a medical officer to obtain the specimen of the urine within a reasonable period.

**[22]** Section 31A of the DDA provides lawfulness of actions taken by officers or listed persons to conduct examination on arrested person. Section 31A(1A) of the DDA specifically gives limited power to the police officer E to facilitate a medical examination, *ie*, to obtain a urine specimen from an arrested person. Arrested person appears to be a pre-condition to sub-ss. 31A(1) and 31A(1A) of the DDA. The prosecution in their petition of appeal contends that the learned Magistrate has erred in finding that the procedure under s. 31A of the DDA has not been complied with as the F respondent was not under arrest or an arrested person before his urine sample was taken. It is argued that the respondent was under a constructive arrest by the fact that SP2 had instructed SP4 to escort the respondent to the washroom for his urine sample to be taken, hence the collection of the respondent's urine sample is legal pursuant to sub-s. 31A(1A) of the DDA.

G **[23]** The law on arrest is settled. The Court of Appeal in *PP lwn. Mohd Safwan Husain* [2017] 7 CLJ 685 had stated that whether a person is arrested or otherwise depends on the facts and circumstances of each case. The Court of Appeal through the judgment of Ab Karim Ab Jalil JCA (as His Lordship then was) stated as follows:

H [28] ... Setelah meneliti kes-kes di atas, kami bersetuju dengan pandangan bahawa pendekatakan-pendekatan tersebut sukar untuk diseragamkan (reconcile) dan agak malang (unfortunate) untuk digunakan seperti mana dikatakan oleh YA Abdul Hamid Mohamad H (ketika itu) dalam *PP v. Abdul Rahim Kalandari Mustan*, *supra*. Pada kami, dalam semua I perundangan yang berkenaan sama ada dalam KPJ atau pun dalam ADB 1952, apa yang perlu ditentukan adalah sama ada telah berlakunya satu tangkapan atau tidak. **Kami berpendapat penentuan isu tersebut akan bergantung pada fakta dan keadaan sesuatu kes itu. Inilah prinsip am yang terpancar daripada pertimbangan kes-kes di atas.** (emphasis added)

**[24]** Based on the principle stated in the above, the Court of Appeal in *PP lwn. Mohd Safwan Husain* (*supra*) found that there were sufficient facts and evidence showing that at the time when the respondent therein was directed to give his urine sample, he was already arrested for purpose of s. 31A(1A) of the DDA.

**[25]** The Court of Appeal in that case reminded that the power of arrest by the police is not prescribed under s. 31A of the DDA but instead under s. 31 of the DDA wherein any police officer or any officer of customs may arrest without a warrant any person whom he reasonably believes to have committed or to be committing an offence against the DDA. To justify reasonable believe that an offence has been committed there ought to have been an information received by the police beforehand as evidence to determine the issue of arrest. In *PP lwn. Mohd Safwan Husain* (*supra*), evidence was adduced showing that the police in that case had acted on information received as to the respondent's involvement on drugs abuse at the police station where he was attached to. In other words, the police in that case was already targeting to arrest the respondent therein by making sure that he was working on the day the raid was conducted. The Court of Appeal was satisfied that in that case, the respondent was already arrested at the time when he was detained and instructed to give his urine sample. The finding was corroborated by the police report which disclosed that the police was acting based on the information received relating to a police personnel involved in drugs abuse activity.

**[26]** The findings of the Court of Appeal in *PP lwn. Mohd Safwan Husain* (*supra*) is reproduced:

> [34] Berlandaskan prinsip am di atas, kami mendapati adanya cukup fakta dan keadaan dalam kes ini yang menunjukkan bahawa pada masa responden diarah memberikan spesimen air kencingnya, dia sudah pun ditangkap bagi maksud s. 31A(1A) ADB 1952. Harus dicatatkan di sini bahawa s. 31A tidak memperuntukkan kuasa menangkap kepada pegawai polis. Kuasa tersebut diberikan dalam s. 31 ADB 1952. Seksyen 31 memberikan kuasa tangkapan jika terdapat kepercayaan yang munasabah bahawa sesuatu kesalahan di bawah ADB 1952 telah dilakukan atau akan dilakukan. Ini mewajarkan pengemukaan maklumat yang diterima (information received) oleh pihak polis sebagai keterangan untuk menentukan isu tangkapan ini (rujuk kes *Raissi v. Metropolitan Police Commissioner* [2009] 3 All ER 14; dan *Shaaban & Ors v. Chong Fook Kam & Anor*, *supra*). Keterangan SP2, sama ada semasa pemeriksaan utama atau pemeriksaan balas, dengan jelas menunjukkan SP2 dan kumpulannya telah bertindak atas maklumat penyalahgunaan dadah oleh suspek iaitu responden, ditempat dia bekerja iaitu sebagai pegawai balai di Balai Polis Kuala Perlis. Sebelum pergi ke balai tersebut, SP2 telah terlebih dahulu menghubungi balai dan memastikan responden bertugas pada hari serbuan. Setibanya di balai tersebut, SP2 telah memperkenalkan dirinya

sebagai Sub Inspektor Narkotik dan telah memaklumkan kedatangan mereka adalah untuk menahan, mengambil dan membuat ujian saringan air kencing ke atas responden. Responden kemudiannya diarahkan untuk menyediakan air kencingnya di tandas balai dengan diiringi dan diperhatikan oleh SP2 dan Koperal Asmadi. SP2 dengan jelas mengatakan responden merupakan sasaran (suspek) serbuan itu dan tiada orang lain yang berada di balai ketika itu. Pada masa yang sama, kumpulan SP2 yang lain telah juga menggeledah kereta responden. Setelah strip ujian ke atas air kencing responden menunjukkan keputusan positif methampethamine, responden telah dibawa ke IPK Perlis untuk tindakan selanjutnya. Dalam keadaan di atas, dan walaupun responden dikatakan memberikan kerjasama, dan sebagai seorang anggota polis sokongan, namun kebebasannya telah disekat dan dia telah dipaksa untuk mengikuti segala arahan yang diberikan – rujuk kes *Alderson v. Booth* [1969] 2 QB 216 yang memutuskan "Held (1) that an arrest was constituted when any form of words was used which, in the circumstances, were calculated to and did bring to the notice of a defendant that he was under compulsion to which he thereafter submitted". Dalam keadaan di atas, kami dapati responden telah ditangkap sebaik sahaja dia ditahan dan diarahkan memberikan spesimen air kencingnya. Hal keadaan ini disokong oleh laporan polis SP2, P6, yang dengan jelas menyatakan:

Bertindak atas maklumat pada 06/05/2014, jam lebih 0930 hrs bertempat dibalai polis Kuala Perlis saya mengetuai sepasukan anggota cawangan narkotik IPK Perlis terdiri dari D/KPL 104368, 124516, 140542, 142263 dan UKPL 173072 setelah saya memperkenalkan diri "polis" dengan mempamerkan kad kuasa telah menahan seorang anggota Konst/ sokongan balai polis Kuala Perlis kerana disyaki terlibat dalam aktiviti penyalahgunaan dadah.

Setelah saspek berada dalam kawalan dan memberikan kerjasama saya telah membuat pemeriksaan fizikal ke atas saspek dan pemeriksaan ke atas kereta saspek jenis proton wira warna kelabu nombor pendaftaran PDJ 9002 yang diletakkan di hadapan balai tetapi tidak menjumpai apa-apa barang yang menyalahi undang-undang. Seterusnya saya dengan dibantu oleh D/KPL 124516 telah membuat ujian saringan awal polis ke atas saspek dengan menggunakan botol urine nombor siri S/N. 0152174 keputusan ujian saringan awal polis dapati air kencing saspek positif methampthemine. Saya tangkap saspek dan telah menerangkan hak-hak saspek untuk menghubungi keluarga serta peguam seperti mana peruntukan sek 28a ktj dalam bahasa melayu dan telah diakui faham oleh saspek.

[35] *Kami berpendapat fakta dan keadaan di sini amat jelas terutamanya penahanan telah dibuat berasaskan maklumat berkenaan satu kesalahan di bawah ADB 1952 yang telah dilakukan oleh responden, dan penahanan itu bukanlah suatu tindakan sekadar untuk membuat pertanyaan ke atas responden. Responden tidak bebas malahan telah mengikut apa yang diarahkan oleh SP2.* Selaras dengan s. 15 KTJ dan penjelasan dalam kes *Shaaban & Ors v. Chong Fook Kam, supra*, *Holgate-Mohammed v. Duke, supra,* serta kes yang dirujuk dan setelah mempertimbangkan secara keseluruhan keadaan ini, kami

berpendapat semasa spesimen air kencing responden diambil bagi tujuan pemeliharaan dan pemeriksaan di bawah s. 31A(1) dan (1A) ADB 1952, responden merupakan seorang yang telah ditangkap dan orang tangkapan (an arrested person) dalam maksud peruntukan tersebut.

(penekanan ditambah)

**[27]** Returning to the present matter, the learned Magistrate relied on the evidence given by the police *ie*, SP2 who had testified that during the raid, arrest would only take place if there is an offence committed. This can be gleaned from the following SP2's evidence:

PB: Setuju saya cadangkan pemeriksaan itu bukan tangkapan. Periksa dahulu tangkap kemudian?

SP2: Ya, bila ada kesalahan baru kita tangkap

**[28]** The finding of the learned Magistrate that there was no arrest as yet before the collection of the respondent's urine sample is further corroborated by the police report lodged by SP2 which states that the respondent was arrested after his urine sample was obtained and suspected to have administered drugs to himself:

Hasil ujian saringan awal polis yang saya jalankan di hadapan suspek dengan menggunakan test strip meth/mop/thc/ket/amp didapati air kencing suspek positif amp. Seterusnya saya tangkap suspek kerana disyaki memasukkan dad ah ke da lam tubuh bad an sendiri.

**[29]** It is of the considered view that the respondent cannot be said to be under constructive arrest just because he was escorted to the washroom by SP4 to give his urine sample because the facts and circumstances of the case did not reveal that this is a situation where the police had suspected the respondent or any of the 143 individuals at the premise having already consumed drugs and it was therefore imperative that the urine sample be obtained immediately before all traces of the drug disappear from their bodies. This is not the case where at the time the respondent was instructed to give his urine sample, he was arrested on a charge of committing an offence against the DDA or alleged to have been committed under such circumstances, as to give reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence against the DDA.

**[30]** This court finds the facts and circumstances of the case shows that this is a random examination conducted by the police during a raid and arrest would only take place if evidence of offence under s. 15(1)(a) of the DDA was obtained. The respondent was only suspected to have committed an offence against the DDA after he has given his urine sample and hence the arrest only took place thereafter.

**[31]** This court is of the considered view that s. 31A of the DDA is not merely procedural. Evidential burden is on the prosecution to prove that the person is/was arrested before the taking of the urine sample under s. 31A(1A) of the DDA. Based on the testimony given by the prosecution's witnesses, facts and circumstances of the case, this court finds that the learned Magistrate did not err in finding that there was no arrest made on the respondent prior to giving his urine sample. As such, the actions taken by the police breached the provision of ss. 31A(1) and 31A(1A) of the DDA.

**[32]** The next question is, whether the evidence *vis-a-vis* the urine sample obtained from the respondent even if it is illegally obtained, is admissible on the ground that it is relevant. In following the jurisprudence advocated in *R v. Sang* [1980] AC 402, the Court of Appeal in *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269 had stated that the court has no discretion to refuse to admit evidence on the ground that it was illegally obtained if it is relevant. However, it is apposite to be reminded that the court has also a discretion to exclude evidence which may be prejudicial more so when the prejudicial effect outweighs its probative value (see: *Kuruma v. The Queen* [1968] 3 WLR 391).

**[33]** This court is of the considered view that the discretion to admit illegally obtained evidence in this case cannot be exercised as the evidence procured was in breach of the specific provision *ie*, ss. 31A and 31A(1A) of the DDA and the said breach cannot be overcome by the principles set out in *R v. Kuruma* (*supra*) and *R v. Sang* (*supra*). This court is guided by the decision in *Aizuddin Syah Ahmad v. PP* [2019] 3 CLJ 318, where the Court of Appeal stated as follows:

> [13] **When an Act sets out a particular procedure, that procedure must be meticulously followed and common law cases cannot override the provision of the Act as well as the supremacy of the Constitution.**
>
> [14] In the instant case, the Act specifically states how the evidence must be procured. **Courts however, on many occasions have thrown out evidence when it was obtained in breach of specific provision of the Act.** For example, confessions statement under s. 113 of the repealed Criminal Procedure Code. (See *Janab's Key To Criminal Procedure Code*, 3rd edn, pp. 431 to 448).
>
> [15] We have read the appeal records and the able submission of learned counsel for the appellant as well as the learned Deputy Public Prosecutor. After giving much consideration, we took the view that the appeal must be allowed. Our reasons *inter alia* are as follows:
>
> (a) In the instant case, it is not in dispute that there was a breach of s. 31A(1A) of DDA 1952. The said breach cannot be overcome by the principles set out in the common law case of *R v. Karuma* as well as *R v. Sang*.
>
> (b) A provision of criminal statute must be strictly **followed failure will amount to breach of rule of law.**

(c) This is a fit and proper case for the urine sample to be excluded and/or expunged from the evidence. By doing so, there will not be any incriminating evidence sufficient to convict the accused.

(emphasis added)

**[34]** It is further found that the admission of the urine sample even if it is obtained illegally would be prejudicial to the respondent on the ground that the respondent had raised a defence at the prosecution stage that he had consumed the soft drinks containing drugs which were made available at the table where he and his friends were at when they came over to the premise. The evidence led during cross examination demonstrates that the respondent was invited to go to the premise by his friend one police constable by the name of Che Muhammad Azrani bin Che Abdullah. At the premise, the respondent and his friend Che Muhammad Azrani bin Che Abdullah were invited to drink by the latter's friends. There were glasses containing soft drinks already made available on the table where they were at. According to the defence, the respondent and his friend Che Muhammad Azrani bin Che Abdullah had consumed the drinks without realizing that they contained dangerous drugs.

**[35]** SP2 denied having been informed by the respondent as to the above facts. However, SP4 in cross-examination admitted that there were liquor and coca cola drinks served on the table but none of the bottle drinks were confiscated. As such the respondent's story cannot be said to be untrue.

**[36]** Meanwhile SP5, as the investigating officer, admitted in cross-examination that the respondent had informed her that he had consumed the drinks made available on the table where he was at when the raid took place at the premise and agreed that the respondent had exposed himself to the risk of being drugged. The testimony by SP5 was extracted by the learned Magistrate and reproduced:

PB: Inspektor kata hasil siasatan menyeluruh adalah kesan urin positif. Saya cadangkan tugas puan bukan untuk siasat apa dalam air kencing semata-mata. Tugas puan untuk pastikan suspek ada memasukkan dadah berbahaya dalam badan itu tugas puan

SP5: Setuju

PB: Saya cadangkan dalam siasatan puan, dalam persoalan itu sebagai IO puan boleh ambil kira kalau ada fakta boleh dipercayai untuk jelaskan bagaimana dadah itu boleh ada dalam air kencing itu selain dari laporan pegawai sains itu puan boleh ambil kira fakta lain

SP5: Setuju

PB: Ini berdasarkan arahan okt saya cadangkan OKT ada ceritakan kepada puan bahawa beliau telah meminum minuman ringan yang tersedia terhidang di atas meja di pusat hiburan tersebut.

Ada beliau maklumkan kepada puan

SP5: Ada Yang Arif

PB: Jadi pembelaan ada mungkin sebelum dia minum minuman itu ada mungkin orang nakal dah masukkan siap-siap dadah dalam minuman itu.

SP5: Dia kata dia ada minum air di kelab tersebut, dan tidak maklumkan saya ada sesiapa letakkan dadah dalam air minuman beliau

PB: Saya cadangkan dia tidak bagitahu sebab dia tidak nampak siapa masukkan dadah dalam minuman itu. Itu cadangan kami. Kalau dia tahu dia tidak minum lah. Ada komen berdasarkan siasatan puan

SP5: Ikutkan dia tidak cerita pada saya ada orang masukkan dadah dalam minuman dia. Tetapi kebanyakan yang kita tahu, kalau dekat kelab ini, ada certain club air dia sediakan kadang-kadang dia telah letak.

PB: Macam pelaris

SP5: Kalau OKT saya selalu tanya diaorang memang tahu. Bagi pihak Jarizal ni mungkin tidak tahu tapi dah terminum. Bagi saya dia tidak perlu pergi pun ke kelab tersebut.

PB: Saya cadangkan dia tidak pergi. Tapi dah terdedah dia minum dan dedahkan diri dia kepada risiko itu. Saya cadangkan OKT pergi ke tempat kejadian yang sepatutnya dia tidak pergi. Dia dedahkan risiko orang masukkan dadah dalam minuman

SP5: Setuju.

**[37]** The respondent in his statement under s. 112 of the CPC had stated that it was the first time he had been to the premise when the raid took place. He had only consumed coke which was served at the material time. He denied having taken any drugs before and did not expect that his urine was positive with amphetamine.

**[38]** The respondent through his lawyer had also served on the investigating officer and the office of prosecution the Alcontara notice dated 18 September 2020 and requested that his version of defence be investigated by the police. SP5 admitted having received the Alcontara notice and that no further investigation was done thereafter.

**[39]** It is incumbent on the police to investigate both the allegation and the respondent's defence fairly and professionally. It cannot be said that the defence put up by the respondent is a belated defence. Timely disclosure have been made by the respondent and there is no evidence of delay on his part in offering an explanation. The respondent's 112 statement under the CPC is made contemporaneously during the course of investigation and failure on the part of the police to investigate the respondent's defence adequately, adversely affect the prosecution's case. Even if there is a failure on the part of the respondent to put up his defence, it can never by itself relieve the prosecution of the duty of establishing the charge against the

respondent on a *prima facie* basis at the prosecution's stage. This court finds that the learned Magistrate has not erred in accepting the defence's version that there is evidence where inference can be made that dangerous drugs were added to the soft drinks consumed by the respondent without his knowledge. This court is of the considered view that it cannot be said that the respondent's version cannot be true. The prosecution must disprove this important part of the respondent's version of the facts which they did not. In those circumstances there is doubt as to whether the respondent did consume or administer dangerous drugs type MDMA to himself with *mens rea* or by statutory presumption. Accordingly, the respondent was rightly acquitted at the close of the prosecution case on these grounds alone.

**[40]** In regard to the other grounds in the prosecution's petition, *ie*, the findings of the learned Magistrate that two urine sample bottles should have been taken by the police, this court finds that the learned magistrate could not be said to be completely in error. This court and the Magistrate court are indeed bound by the decisions in *PP lwn. Rosman Saprey & Satu Lagi Rayuan* [2019] 4 CLJ 767 CA and *PP v. Ahmad Saiful Islam Mohamad* [2023] 2 CLJ 714 where in both cases, the Court of Appeal had decided that the failure of the police to collect the respondent's urine sample in two bottles was not fatal to the prosecution's case.

**[41]** However, in the instant case, the view taken by the learned Magistrate was made on the grounds that there were two different results as to the type of drugs found in the same urine sample bottle of the respondent. The preliminary screening test conducted by SP2 on the respondent's urine sample was tested positive for amphetamine whilst in the report by SP3, the drugs found in the said same urine sample bottle was MDMA. In fact, in the laboratory report produced by SP3 (P7) it is stated that by using the gas chromatography mass spectrometry test, no amphetamine was found in the respondent's urine sample. No explanation was proffered by SP3 as to whether amphetamine and MDMA are the same type of drugs as well as to why or what could be the possibility as to the difference in the findings of the type of drugs during the preliminary screening test and the gas chromatography mass spectrometry test. This discrepancy is detrimental when there were allegations put to the prosecution witnesses that the seal that was said to have been put on urine sample bottle in the presence of the respondent with the specific number of the "bahagian siasatan jenayah narkotik" (as per the evidence of SP2 and SP5) was not stated in P6 (borang permintaan ujian saringan/pengesahan dadah dalam air kencing) and the said seal and the specific number cannot be seen from the photograph of the urine sample bottle in P2. No efforts on the part of the prosecution to explain these discrepancies through their witnesses. Therefore, on this ground too, this court cannot find fault in the findings of facts made by the learned Magistrate in discharging and acquitting the respondent of the charge against him.

**[42]** The present appeal is substantially factual. The learned Magistrate has considered and evaluated the evidence before her and rightly found that the prosecution has failed to prove a *prima facie* case against the respondent. This court finds no error that warrants appellate intervention. In any case, an appellate court should be slow in interfering with the trial court's findings of fact.

## Conclusion

**[43]** Premised on the above, this court finds that it is not safe to convict the respondent on the said charge if defence is called and if he elects to remain silent based on the surrounding facts of this case.

**[44]** Therefore, this court dismissed the prosecution's appeal and affirmed the decision of the Magistrate court in discharging and acquitting the respondent of the said charge preferred against him.